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In The

Supreme Court of the United States

NOV 22 1972

October Term 1972

72-76

JOSEPH LIPTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term 1972

JOSEPH LIPTON,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner, JOSEPH LIPTON, respectfully prays that this Court will grant a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to review its order and judgment of the 19th day of September, 1972, which affirmed the judgment of the United States District Court for the Southern District of New York, convicting the defendant-petitioner, JOSEPH LIPTON, of accepting a bribe in violation of 18 U.S.C. §201(c)

(1970). JOSEPH LIPTON was an Internal Revenue Service agent for a number of years and had had an exemplary record up to this point.

Opinion Below

The opinion below in the United States Court of Appeals for the Second Circuit which is not yet officially reported is reprinted in the Appendix hereto.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The Court of Appeals for the Second Circuit denied a motion for rehearing on October 23, 1972.[1]

Questions Presented

1. Whether LIPTON was denied his Sixth Amendment right to confrontation in cross-examination and deprived of a Fifth Amendment right to a fair trial when the Trial Judge sustained the main witness' (William Williams) invocation of the Fifth Amendment privilege against self-incrimination as to a matter which seriously affected his credibility as a witness? It cannot be disputed that without the testimony of William Williams there could not have been a conviction in this case since there was no other incriminating evidence of any substance against the petitioner.

---

1. The Docket Number of the Appeal in the United States Court of Appeals is 72-1198.

2. Whether the main Government witness in a prosecution, without whose testimony no conviction could have been obtained, can be permitted to invoke the Fifth Amendment privilege against self-incrimination in order to stifle and preclude effective cross-examination on a matter affecting the credibility of the witness? There is no dispute about the fact that William Williams' testimony was indispensable to the conviction herein and that his credibility as a witness was paramount in the entire case.

3. Whether it was error for the United States Court of Appeals, Second Circuit, to decline to invoke the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure to rectify an error made in the Trial Court when it allowed the hearsay testimony of another agent, Ruggiero, who corroborated prior statements of William Williams? The testimony of Ruggiero however, could not be deemed evidence-in-chief, but the Trial Court did not instruct the jury to that effect. Thus, the jurors might well have assumed that Ruggiero gave testimony upon which they could rely for conviction.

4. Whether the Fifth Amendment right of the defendant against self-incrimination were violated by the prosecutor's remarks in summation that the defense had failed to call certain witnesses?

Constitutional and Statutory Provisions Involved

The Fifth and Sixth Amendments of the United States Constitution and 18 U.S.C. §201(c) (1970) are herein involved.

The Factual Background of the Case

The petitioner herein was indicted charged with bribery and receiving gratuities. The factual pattern upon which this indictment was based arose during an examination by the Internal Revenue Service of the 1960 through 1964 corporate tax returns of a family-owned chain of grocery and meat markets controlled by five Shallo brothers, and also of an audit of the brothers' individual returns.

In June of 1966, after two years of investigation, Walter Haber, the Revenue agent who conducted the field audit, disallowed all deductions claimed by the corporation for purchases allegedly made for cash from wholesale suppliers on the ground that such deductions were insufficiently supported. He charged them for their sale however. In addition, he rejected the brothers' explanation as to the source of approximately $10,000 in their bank account and attributed that sum as income to the corporation and the brothers. After recomputing the corporation's and the brothers' individual returns, Haber assessed deficiencies (hereinafter referred to as "the deficiency" or "the deficiency assessment") totalling $275,000 plus penalties of $4,000 against the corporation and the Shallos.

In August of 1966, the Shallos were introduced by a mutual friend to William Williams.[2] At that time he was representing taxpayers before the Internal Revenue Service. The taxpayers

2. Williams is a self-confessed thief and briber who has testified for the Government in several cases.

had become dissatisfied with their own accountant who had represented them during the field audit. They retained Williams to represent them in an administrative proceeding to reduce the deficiency assessment.

Williams caused a protest to be filed with respect to the field audit. He claimed the Revenue agent had not allowed deductions for the wholesale purchase of produce by the corporation but had permitted the corporation to be taxed for income derived from the retail sale of produce. In addition, acting pursuant to I.R.S. regulations, Williams bypassed a hearing in the Conference Section and filed a protest with the Appellate Division. Under the procedure the assessment made by the Field Agent would be reviewed by an Appellate Conferee who had authority to increase or decrease the taxpayers deficiency assessment.

Some time thereafter, Williams learned that the Appellate Division had assigned JOSEPH LIPTON as Appellate Conferee.

Only Williams had any contact with the petitioner JOSEPH LIPTON in this case.

There was no evidence that the assignment of LIPTON was other than fortuitous despite the fact that Williams, while he had been an employee of the Internal Revenue Service, had known LIPTON for eight or ten years.

In January of 1967, Williams first met LIPTON to discuss the Shallo case. Williams informed

LIPTON that the Shallos were gathering letters from the suppliers to substantiate the deductions for cash payments. There was no evidence that at this first session there was any suggestion of a bribe.

The Shallo brothers were represented by their brother, James Shallo, who was one of the subjects of the I.R.S. audit. In his meetings with Williams, he testified that Williams had indicated to him that a bribe of approximately $15,000 to "someone downtown in the Appellate Division" would have to be paid to straighten the matter out. On or about August 10, 1967, Williams testified that LIPTON agreed to accept the sum of $15,000 to straighten out the case. Some time between August 10th and August 15th of 1967, Williams obtained from James Shallo the sum of $13,000 in a bag, all in cash. On the afternoon of the same day, Williams claimed he met with LIPTON at a downtown restaurant and stated that he gave LIPTON $13,000.

On August 16, 1967, LIPTON gave Williams a set of forms by which the I.R.S. offered to reduce the deficiency from $279,000 to approximately $20,000 plus $4,000 in interest and penalties. On August 18th, Williams returned to LIPTON the forms which had been signed by the taxpayers to indicate their acceptance of the I.R.S. offer. The reduced assessment was paid and the case was closed.

Both Williams and LIPTON were ultimately indicted, charged with bribery and accepting gratuities. LIPTON was convicted of the bribery

count. Williams was the only witness against him who presented incriminatory evidence.[3]

The petitioner never took the stand in his own defense nor did he call any witnesses on his behalf.

Another I.R.S. agent, Lawrence Ruggiero, had called the attention of the I.R.S. to the fact that Williams, in September of 1969, had admitted to him that he paid a bribe to LIPTON on the Shallo case.

Ruggiero had never had any contact with LIPTON and, indeed, there is no evidence that he even knew LIPTON.

Other than Williams' own testimony, there is absolutely no corroboration of the accusation that the petitioner herein received any bribe money or had any discussion about bribes at all.

During the cross-examination of William Williams by defense counsel at trial, there was an effort to elicit whether or not he had lied concerning the fee which he had received from the Shallos for his representation of them. Defense counsel sought to determine whether or not Williams had received $1,500 in checks and $2,000 in cash. Williams conceded that he may have told the agents of the I.R.S. Inspection Division that he had received only $1,500 in cash. Defense counsel then asked Williams if he reported the cash as income. At this juncture, William

3. Lipton has been sentenced to one year imprisonment and a $2,500 fine.

Williams invoked his Fifth Amendment privilege against self-incrimination.

It must be borne in mind that William Williams was a cooperating Government witness and was the only witness against LIPTON so far as incriminating evidence was concerned. It is beyond the possibility of doubt that without the testimony of William Williams there could not have been a conviction of the petitioner herein.

The Court nevertheless told the witness, Williams "You have a right to raise the Fifth Amendment here as to matters not pertaining to this indictment." The Court below agreed with this instruction. But the questions did involve this case!

It is the position of the petitioner herein that this was wholly improper and that it deprived the petitioner of effective cross-examination as to the credibility of this essential witness. Having taken the stand, the witness no longer could claim the privilege against self-incrimination and it is contended that the Trial Court erred in claiming otherwise.

The witness, Lawrence Ruggiero, was called by the prosecution for the purpose of rehabilitating William Williams since it was the position of the prosecution that his credibility had been attacked as a recent fabrication. Not only is there little evidence in the record that William Williams was being attacked from the standpoint of creating a recent fabrication, but the testimony of Ruggiero was complete hearsay since it only related to

conversations between Ruggiero and William Williams outside the presence of the petitioner.

The Court, however, compounded the error by admitting the testimony of Ruggiero who said that William Williams had told him that he had bribed the petitioner during the handling of the Shallo case.

This evidence, of course, could not be deemed evidence-in-chief and under no circumstances could the jury be permitted to consider this as evidence upon which they could convict.

Unfortunately, the defense counsel at trial did not request the Court to instruct the jury that Ruggiero's testimony was only to bolster the credibility of Williams and was not evidence-in-chief and, therefore, could not be relied upon for the purpose of convicting the petitioner. In other words, the Court should have instructed the jury that if they disbelieved the witness, Williams, they must acquit the petitioner. There is no such instruction in the record. The jury therefore could well have assumed that the testimony of Ruggiero could be considered as possible evidence-in-chief upon which a conviction could lay. The vice of this omission was extremely serious since Williams had been substantially discredited and Ruggiero, on the other hand, was portrayed as someone almost beyond corruption.

The fact remains that Williams could very well have been inventing these matters since he was then cooperating with the Government and was seeking to avoid income tax assessments against

himself. This is obvious because if the $13,000 was not paid over to LIPTON, then obviously Williams pocketed the money and should have paid income tax on it. There was therefore strong motive for him to lie.

The Court below should have invoked the plain error rule under Federal Rule of Criminal Procedure 52(b) and declare that plain error existed and reversed. Unfortunately, the Court of Appeals did not do this and we are asking this Court, in its supervisory powers over federal trials, to invoke this rule at this time.

During summation, the trial prosecutor referred to the fact that the defendant (LIPTON) had failed to call the witnesses Haber or Ragni on his behalf. This was wholly improper since there is no obligation whatsoever for the defendant in a criminal case to call any witnesses since the burden of proof is exclusively upon the prosecution.

Argument

Point I

THE PETITIONER WAS DENIED A SIXTH AMENDMENT RIGHT OF CONFRONTATION BY THE TRIAL COURT'S REFUSAL TO PERMIT HIM TO CROSS-EXAMINE THE MAIN WITNESS FOR THE PROSECUTION, WILLIAM WILLIAMS, ON A MATTER OF WHETHER OR NOT HE HAD REPORTED CERTAIN CASH PAYMENTS FROM THE SHALLO BROTHERS IN HIS INCOME TAX RETURN. THE TRIAL JUDGE RULED THAT THE FIFTH AMENDMENT PRIVILEGE COULD BE INVOKED BY WILLIAM WILLIAMS EVEN THOUGH HE WAS TESTIFYING AS THE MAIN GOVERNMENT WITNESS AGAINST LIPTON.

As has been explained in the rather detailed statement of facts, William Williams was an indispensable witness in this case since he alone testified as to any criminality affecting the petitioner herein. No one else in the case ever met LIPTON, and no one knew whether or not there had been discussions about bribes, and certainly were unaware of the payment of any money, except through the lips of William Williams who was an admittedly corrupt former I.R.S. official. As a matter of fact, William Williams conceded that he had been corrupt in other transactions as well.

There was strong motivation for William Williams to lie since the $13,000 bribe allegedly paid to LIPTON, if actually retained by Williams, would have to have been reported by Williams in his own income tax return, which, of course, he did not do.

In order to spell out a pattern of behavior on the part of William Williams, the defense counsel at trial sought to determine whether or not $2,000 in cash payments received from the Shallo brothers as fee by William Williams was ever reported by him in his income tax return. It was to this line of inquiry that William Williams invoked the Fifth Amendment privilege against self-incrimination. The Trial Court, we submit, improperly sustained this position. Accordingly, the responses to these questions were not permitted.

The witness, William Williams, was a cooperating Government witness and was the only witness against the petitioner herein, as we have said, who could establish his guilt. To foreclose any sort of interrogation remotely relevant to the issues was therefore error. This, therefore, was not the type of refusal which could be properly invoked. It is submitted that under the circumstances the refusal to testify and the sustaining of that position constituted reversible error.

In a proper case, it may be that a Court can sustain a Fifth Amendment privilege of a witness (see, Coile v. United States, 100 F.2d 206). That is not the case herein, of course. The witness was a cooperating Government witness and by taking the stand had waived any possible self-incrimination. The questions propounded involved this very case and not some other case.

It is contended that there was no valid basis for the invocation of this privilege. (United States v. Hoffman, 100 F.2d 806, cert. denied, sub. nom.

Hoffman v. United States, 390 U.S. 1031; United States v. Gernie, 252 F.2d 664, 670, cert. denied, sub. nom. Gernie v. United States, 356 U.S. 968; United States v. Cioffi, 242 F.2d 473, 477; and United States v. Romero, 249 F.2d 371, 375.)

Under the circumstances, therefore, the Court clearly violated the Sixth Amendment right of the petitioner to confrontation and to compel attendance of witnesses by precluding him from questioning William Williams on this essential line which would have established not only a pattern of behavior but would have seriously damaged his credibility as a witness. It was obvious that Williams had something to hide, and it is unconscionable for the Government to be permitted to produce a witness who will avoid cross-examination on a matter relevant to the case by invoking his self-incrimination privilege.

On this basis alone we submit that certiorari should be granted.

Point II

THE COURT BELOW SHOULD HAVE RECOGNIZED AS PLAIN ERROR UNDER RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE THE OMISSION OF THE TRIAL COURT TO INSTRUCT THE JURY THAT THE TESTIMONY OF AGENT LAWRENCE RUGGIERO COULD NOT BE VIEWED AS EVIDENCE-IN-CHIEF IN THE CASE AT BAR AND THAT NO CONVICTION COULD BE PREDICATED UPON IT. THE TRIAL COURT SHOULD FURTHER HAVE INSTRUCTED THE JURY THAT IF THEY DISBELIEVED THE TESTIMONY OF WILLIAM WILLIAMS, THEY HAD TO ACQUIT. SUCH AN INSTRUCTION WAS NEVER GIVEN. THUS IT IS CLEAR THAT THE TRIAL JURORS MIGHT WELL HAVE THOUGHT THAT THE TESTIMONY ADDUCED FROM AGENT RUGGIERO COULD BE USED AS A BASIS FOR CONVICTION.

The defendant at trial, the petitioner herein, was severely prejudiced when the Trial Court permitted the Government to introduce evidence from I.R.S. agent Lawrence Ruggiero that William Williams had previously told him that he had given a bribe to the petitioner.

In Grumenthal v. Long Island Railroad Company, 2 Cir. 1968, 388 F.2d 480, cert. denied, 393 U.S. 156, the Court indicated that where the motive of a witness is the same when a prior statement is made, that is, to exonerate himself from blame, the prior statement is not admissible because its consistency proves nothing.

The motive of Williams when he conversed with Ruggiero prior to the indictment was really the same as when he testified at the trial. He was trying to exonerate himself from having received $13,000 in bribe money. Moreover, there was obviously inconsistencies between the direct testimony of Williams and the so-called testimony of consistency which Ruggiero attempted to establish. In other words, he had told Ruggiero different things than he testified to at trial. Moreover, it is submitted that since there was no evidence at all that the witness William Williams had given a prior sworn statement or even a prior written statement, there was no basis for using this conversation with Ruggiero as a prior consistent statement. (See, 5 Wigmore on Evidence, §1362 (3rd Ed. 1940); 6 Wigmore on Evidence, §§1813, 1831 (3rd Ed. 1940).

As has been mentioned, the Trial Court did not tell the jury that the evidence of Ruggiero was only for the purpose of bolstering the credibility of Williams and was not evidence-in-chief.

In Culwell v. United States, 5 Cir., 194 F.2d 808, the Court of Appeals there condemned the use of hearsay, adding that the Court, at the very least, must instruct the jury that the hearsay testimony is admitted on the question of credibility and not as evidence-in-chief for the prosecution.

See, also, Southern Railway v. Gray, 241 U.S. 333, 337; Kuhn v. United States, 9 Cir., 24 F.2d 910; Green v. State, Maryland 1966, 220 A.2d 544, 546, 243 Md. 154; and State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).

For this reason, too, certiorari should be granted.

Point III

DURING SUMMATION THE PROSECUTOR COMMENTED THAT THE DEFENSE HAD NOT CALLED CERTAIN WITNESSES SUCH AS AGENT HABER OR THE FORMER ACCOUNTANT FOR THE SHALLO BROTHERS, RAGNI. THIS VIOLATED THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION OF THE PETITIONER AND, IN ESSENCE, LET THE JURY BELIEVE THAT THE BURDEN OF PROOF WAS NOT EXCLUSIVELY UPON THE GOVERNMENT BUT RESTED UPON THE DEFENSE AS WELL.

We have already mentioned the fact that the prosecutor in summation had remarked about the failure of the defendant-petitioner to call certain witnesses. At 309a and 310a of the Appendix below, the prosecutor declared, inter alia:

> "If Mr. Haber's report was unfair, why didn't Mr. Kantor call Mr. Haber and prove that to you? Why didn't he call Mr. Ragni [the Shallos' accountant] and say, 'I didn't like Haber. He was no good. He was unfair.' Why wasn't there some evidence of this?"

This was wholly improper. The injection of a thought that the defendant-petitioner was required to offer proof in his own defense was substantially an allegation that he should have testified in his

own behalf. The comment, in any event, was wholly improper and prejudicial (Stewart v. United States, 336 U.S. 1 [1961]; Griffin v. California, 380 U.S. 609 [1965]; and Wilson v. United States, 149 U.S. 60 [1893]).

It is submitted, moreover, that in a one-witness case such as this, such a comment cannot be deemed "harmless error beyond a reasonable doubt." (Chapman v. California, 386 U.S. 18, 24 [1967].)

It should also be noted that 18 U.S.C. §3481 also prohibits what was done here.

It should be noted that in the case at bar this was not merely an assertion that certain evidence was uncontradicted (United States v. Day, 3 Cir. 1967, 384 F.2d 464; Fowler v. United States, 5 Cir. 1962, 310 F.2d 66.) This was an actual statement to the effect that the petitioner should have called certain witnesses in order to establish the negative of something. For this reason it is far more egregious than a mere isolated comment that there was no contradiction.

Point IV

THIS COURT SHOULD OVERRULE THE COURT BELOW AND INVOKE RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ORDER TO OVERTURN THE CONVICTION HEREIN ON THE GROUNDS THAT THE TRIAL COURT ERRED IN NOT CHARGING THE JURY THAT IT MUST ACQUIT IF IT DISBELIEVED WILLIAM WILLIAMS AND FURTHERMORE, THAT THE EVIDENCE ADDUCED FROM AGENT RUGGIERO WAS NOT EVIDENCE-IN-CHIEF.

This Court has long recognized that in fairness no defendant should be convicted if error has crept into a record and it cannot be established that such error was harmless beyond a reasonable doubt (Chapman v. California, supra).

This Court, of course, has supervisory powers over Federal Courts and may set standards which perhaps even exceed those of constitutional dimension (e.g., Brady v. Maryland, 373 U.S. 83; Griffin v. California, 380 U.S. 609; and Mesarosh v. United States, 352 U.S. 1, 9).

The Court below in essence recognizes that the Trial Court would have to have instructed the jury that it must acquit if it disbelieved Williams and that the evidence of Agent Ruggiero could not be deemed evidence-in-chief if there had been a request for such instructions by defense counsel. Unfortunately, defense counsel made no such request.

The defendant-petitioner herein however, has a long and honorable record with the Internal Revenue Service and was an Appellate Conferee at the time he was indicted. The witness, William Williams, was a disgrace to his profession as well as to the I.R.S. service to which he had formerly belonged. He admitted that on a number of occasions in different cases he had been corrupt and had obtained bribes. William Williams alone was the cause of the conviction herein since only he testified that there was a bribe conversation and that supposedly the petitioner solicited and accepted a bribe.

This is, therefore, a one-witness case where the one witness is also an accomplice as a matter of law.

In such a tenuous case, the Court should bend over backward to prevent the possibility of error. There was strong motivation on the part of William Williams to lie and to fabricate.

In view of the foregoing, Rule 52(b) should be liberally invoked. The Court below refused to do so.

We ask this Court to invoke Rule 52(b) to prevent a travesty of justice. The refusal of the Trial Court to permit certain cross-examination of William Williams was bad enough, but the inadequacy of the charge, considering that the jury may have regarded Ruggiero as a witness-in-chief, compounds the error. The petitioner herein should be given a new trial.

Under all of these circumstances, we ask this Court to invoke its supervisory powers over Federal Courts so as to prevent an injustice. The Record herein, we submit, is one of the thinnest that the writer hereof has seen in a criminal prosecution and the writer hereof has argued hundreds of appeals.

There is clearly room to determine that error did exist and it cannot be said that such error was harmless beyond a reasonable doubt.

For all of the foregoing reasons in all the Points herein mentioned, we ask that this Court grant the Petition for Certiorari and that it reverse and remand the case for a new trial.

Conclusion

The Petition for Certiorari should be granted and this Court should ultimately reverse the conviction and remand the case for a new trial.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of September, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY, Chief Judge,
HON. CARL McGOWAN,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

- - - - - - - - - - - - - - - - -x
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH LIPTON,

Defendant-Appellant.

- - - - - - - - - - - - - - - - -x

Appeal from the United States District Court for the Southern District of New York.

Judgment of Affirmance of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

R. DANIEL FUSARO
Clerk

Decision

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 773—September Term 1971.

(Argued May 12, 1972 Decided September 19, 1972)

Docket No. 72-1198

- - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH LIPTON,

Appellant.

- - - - - - - - - - - - - - - - -x

Before:

FRIENDLY, Chief Judge,
McGowan and Timbers, Circuit Judges

Appeal from judgment of conviction after jury trial in the Southern District of New York, Richard H. Levet, District Judge, finding appellant, an IRS agent, guilty of accepting a bribe in violation of 18 U.S.C. §201(c) (1970).

Affirmed.

Decision

IRVING ANOLIK, New York, N.Y.,
for Appellant.

THOMAS J. FITZPATRICK, Asst. U.S. Atty., New York, N.Y. (Whitney North Seymour, Jr., U.S. Atty., Howard Wilson and Peter F. Rient. Ass't. U.S. Attys., New York, N.Y., on the brief), for Appellee.

TIMBERS, Circuit Judge:

Appellant Lipton appeals from a judgment of conviction entered upon a jury verdict after a five day trial in the Southern District of New York, Richard H. Levet, District Judge, finding him guilty of accepting a bribe as an IRS agent, in violation of 18 U.S.C. §201(c) (1970).* On appeal Lipton claims error in the limitation of cross-examination of a co-defendant, in the admission of hearsay evidence, in the prosecutor's reference in summation to the failure of the defense to call witnesses, and, in the failure of the prosecutor to produce material claimed to be required by the Jencks Act or Brady v. Maryland, 373 U.S. 83, 87 (1963). Finding no error, we affirm.

I.

This prosecution, like several others involving corruption among IRS agents in the New York

* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

City area, developed from evidence given to federal authorities by William Williams, a corrupt Westchester County taxpayers' representative.[1] When arrested by agents of the IRS Inspection Division on January 22, 1970, after an 18 month undercover investigation. Williams confessed to the bribing of various IRS agents and provided authorities with the names of agents involved. Lipton was one of the agents implicated by Williams. He testified as the chief government witness at Lipton's trial.[2]

The bribe here involved arose as the result of an examination by the IRS of the 1960-64 corporate tax returns of a family-owned chain of grocery and meat markets controlled by five Shallo brothers, as well as the brothers' individual returns. In June 1966, after two years of investigation, Walter Haber, the revenue agent who conducted the field audit, disallowed all deductions claimed by the corporations for purchases allegedly made for cash from wholesale suppliers on the ground that such deductions were insufficiently supported. In addition, he rejected the brothers' explanation as to the source of approximately $10,000 in their bank accounts and attributed that sum as income to the corporations and the brothers. After recomputing the corporations'

1. Lipton also was indicted for accepting a gratuity, in violation of 18 U.S.C. §201(g) (1970). Pursuant to the judge's instructions, the jury did not render a verdict on the gratuity count (Count Four), since it convicted Lipton on the bribery count (Count Three). Lipton was sentenced to a one year term of imprisonment and was fined $2,500.

2. For 20 years prior to his retirement in December 1965, Williams had been an IRS special agent.

and the brothers' individual returns, Haber assessed deficiencies (hereinafter, "the deficiency" or "the deficiency assessment") totalling $275,000, plus penalties of $4,000, against the corporations and the Shallos.

In August 1966, the Shallos were introduced by a mutual friend to Williams. At that time he was representing taxpayers before the IRS. The Shallos had become dissatisfied with the accountant who had represented them during the field audit. They retained Williams to represent them in administrative proceedings to reduce the deficiency assessment.

Williams first filed a protest with respect to the field audit. He claimed that the revenue agent had not allowed deductions for the wholesale purchase of produce by the corporations, but had permitted the corporations to be taxed for income derived from the retail sale of produce. In addition, acting pursuant to IRS regulations, Williams by-passed a hearing in the conference section and filed a protest with the Appellate Division. Under this procedure the assessment made by the field agent would be reviewed by an Appellate Conferee who had authority to increase or decrease the taxpayers' deficiency assessment. Sometime thereafter, Williams was informed by the Appellate Division that Joseph Lipton, appellant herein, had been assigned as Appellate Conferee. Although Williams and Lipton had been colleagues for 8 to 10 years while Williams was with the IRS, the record does not indicate that Lipton's assignment to this case

was pre-arranged by Williams or was other than fortuitous.

In January 1967, Williams first met with Lipton to discuss the Shallo case. Williams informed Lipton that the Shallos were gathering letters from their suppliers to substantiate the deductions for cash payments. There is no evidence that at this first session there was any suggestion of a bribe.

Sometime during the spring of 1967, however, Williams' efforts to reduce the deficiency shifted to illegal means. While there is a conflict between the testimony of James Shallo, the only one of the five brothers who testified, and Williams as to the details of the negotiations,[3] it is clear that by August 10, Shallo had agreed to pay a bribe of approximately $15,000 to "someone downtown in the Appellate Division." While Lipton agreed to accept this sum, it appears that Williams never divulged the corrupt agent's name to Shallo. Sometime between August 10 and August 15, Williams obtained from Shallo a paper bag containing $13,000. On the afternoon of the same day, Williams met with Lipton at a downtown restaurant and gave Lipton the $13,000.

On August 16, Lipton gave Williams a set of forms by which the IRS offered to reduce the

3. Williams was indicted as a co-defendant with Lipton. He was charged with giving Lipton a bribe (Count One) and a gratuity (Count Two) in connection with the $13,000 payment at issue here, in violation of 18 U.S.C. §§201(b) and (f) (1970). Prior to trial, Williams pleaded guilty to the bribery count. His case was severed.

deficiency from $279,000 to approximately $20,000, plus $4,000 in interest and penalties. On August 18, Williams returned to Lipton the forms which had been signed by the taxpayers to indicate their acceptance of the IRS offer. The reduced assessment was paid and the case was closed.[4]

Following Williams' arrest in January 1970, the indictment against him and Lipton was returned May 13, 1970. The trial of Lipton began December 7, 1971 and was concluded December 13, 1971, when the jury found Lipton guilty on the bribery count. Lipton did not testify at his trial and did not present any evidence. He was sentenced January 14, 1972, and has been enlarged on bail pending appeal.

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4. Shallo testified that in the spring of 1967 Williams told him that he could "take care of [the deficiency] with someone downtown in the Appellate Division" for $5,000 and that the deficiency would be reduced to "practically nothing." When Shallo said that he wanted to "go through the courts and fight it out in the open," Williams estimated that the legal costs would be $50,000 to $60,000. Sometime in July, Williams returned and told Shallo that the amount required to fix the case had increased to $15,000—$18,000. Shallo indicated a willingness to pay a bribe but objected to the amount. After Williams made a phone call, he told Shallo that for $13,000 the deficiency would be reduced to practically nothing. To this Shallo agreed.

Williams testified, on the other hand, that Lipton had initiated the bribe attempt in May 1967 when he offered to reduce the assessment from $279,000 to $25,000 in return for a payment to Lipton of $25,000, or approximately 10% of the savings. Williams told Lipton that the Shallos could not afford such a large sum. Lipton insisted that such sum was required because he "had to take care of somebody on the inside." After several meetings in June, July and August, Lipton agreed to accept $15,000, a figure to which Shallo, after meeting with Williams, also agreed.

Decision

II.

Lipton contends that the district judge unduly limited his trial counsel's scope of cross-examination of Williams.[5] We disagree. Our careful examination of the entire record leaves us with the firm conviction that Lipton's counsel was given ample opportunity to cross-examine Williams and that Judge Levet's rulings were well within his discretion as the trial judge.

Brief reference to certain of the testimony preceding the cross-examination of Williams will place in context Lipton's claim that his cross of Williams was unduly curtailed.

James Shallo, the government's first witness, testified on direct regarding the amount of the deficiency assessment and the payment of the bribe.[6] On cross, Shallo admitted that Williams never named Lipton as the corrupt agent, that he never met Lipton and that he did not see Williams give the $13,000 to Lipton.

The government next called Williams. On direct, he testified to his version of the bribe negotiations[7] and the reduction of the deficiency assessment from $279,000 to $24,000. He fur-

5. The 1960-64 returns of the corporations and the Shallos were re-opened as a result of Williams' disclosures and again were being audited at the time of the trial of this case.

6. Lipton was represented at trial by counsel other than his counsel on this appeal.

7. Note 4, supra.

ther testified that for his services the Shallos paid him a fee of $3,500—one $500 check, a second $1,000 check, and $2,000 in cash. He insisted that this fee constituted the sole payment to him in the case, and that the full $13,000 from the Shallos was given to Lipton. On cross, defense counsel sought to establish that Williams retained the $13,000.

It was at this point that the first challenged ruling was made. Defense counsel asked Williams if the cash "you received from James Shallo was not paid to Mr. Lipton but was retained by you."[8] Williams answered in the negative, volunteering that he would not lie because it would subject him to a charge of perjury. Defense counsel then asked him who would decide whether a perjury charge was to be brought. The government objected. Judge Levet sustained the objection as to form and relevancy.[9]

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8. Note 4, supra.

9. The following is the testimony and colloquy immediately preceding the ruling in question:

"Q. Mr. Williams, isn't it a fact that the cash which you received from James Shallo was not paid to Mr. Lipton but was retained by you?

A. Definitely not. I, certainly at this stage of the game, wouldn't get up here and perjure myself. I'm in enough trouble as it is without having a perjury rap on top of a bribery rap.

Q. Who would make the determination. Mr. Williams?

The Court: Who would make what determination? Mr. Fitzpatrick: [Asst. U.S. Atty.] Objection.

Q. About a perjury rap.

Mr. Fitzpatrick: I object to the form of the question, Your honor.

The Court: Sustained, not merely to the form, but because it is irrelevant.

(Cont'd)

Decision

Lipton contends that the judge erred in sustaining the objection. He argues that the jury could have inferred from Williams' answer that he might seek to ingratiate himself with the federal authorities in the hope of leniency, in the six pending bribery cases in which he had pleaded guilty, by testifying falsely against Lipton without risk of prosecution for perjury.

We appreciate the force of Lipton's argument that with a witness such as Williams' considerable latitude on cross should be permitted to show motive, bias and interest. And we note that the government with commendable candor concedes, Government Brief 7, that "the answer might have added support for the argument that Williams was beholden to the Government." But we completely agree with the government's further observation that "Lipton had already made this point ad nauseum." Id. Cross-examination of Williams covers 68 pages of the trial transcript—more than a quarter of the total testimony. Lipton's counsel established over and over again Williams' interest and motive in cooperating with the government. To have permitted him to testify in substance that it was the United States Attorney who would determine whether he should be prosecuted for perjury, all else aside, would at best have been cumulative on the issue of bias. See United States v. Russo, 442 F.2d 498, 503 (2 Cir.

(Cont'd)

Q. Did an inspector ever say to you, Mr. Williams, that if he believed you weren't telling the truth, he would cause you to be prosecuted for perjury?

Mr. Fitzpatrick: I object to that, Your honor.
The Court: Sustained."

1971), cert. denied, 404 U.S. 1023 (1972); cf. United States v. Campbell, 426 F.2d 547 (2 Cir. 1970). In a slightly different context (withholding a portion of an IRS report claimed to be relevant on the issue of the motive and bias of a government witness), Judge Hays in Campbell stated the criteria for the trial judge's exercise of discretion as follows:

> "In determining whether the trial judge has abused his discretion in limiting the introduction of such [impeaching] evidence, the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias" 426 F.2d at 550.

We hold here that the jury was otherwise in possession of more than sufficient information on the issue with respect to which it is claimed the excluded testimony would have been relevant.[10]

The next challenged ruling on cross of Williams is that the judge sustained an objection to a question as to whether Williams had told an IRS inspector two years earlier that the audit in the Shallo case was "ridiculous." The judge, in sus-

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10. Lipton also contends that the judge improperly limited his attempts to establish Williams' bias by asking him whether he had accused other agents of accepting bribes. This claim is wholly without merit. Aside from the fact that the government's objections and the judge's rulings were addressed only to the form of the questions, the record shows that this information was fully developed in subsequent questioning.

taining the government's objection, stated that "[i]t doesn't in any way impeach his testimony, nor does it refresh his testimony or anything else." We agree.

The line of cross was directed at Williams' initial protest with respect to the field audit based on the claim, referred to above, that the revenue agent had not allowed deductions for the wholesale purchases of produce by the corporations but had permitted the corporations to be taxed for income derived from the retail sale of produce. Defense counsel had already cross-examined Williams at considerable length to establish that the revenue agent disallowed all wholesale cash purchases of produce. Elsewhere on cross, counsel had established that Williams based his protest on the inconsistency in the agent's refusal to allow sufficient cash purchases to create the volume of sales on which he based the corporations' taxable income.[11]

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11. "A. [Williams]: I caused a protest to be filed based on the fact that the revenue agent hadn't allowed any cash purchases for produce, and if they had sales, they had to have purchasers.

* * *

Q. [W]ere the totals of cash purchases you computed greater than the purchases allowed by the revenue agent in his examination?

A. The total of cash purchases as represented by the letters that were sent out and returned by the suppliers was greater; yes."

Decision

In the light of this previous testimony by Williams on cross regarding errors allegedly made in the field audit, the exclusion of his characterization of the audit as "ridiculous," even if relevant, surely would have had little if any additional impact on the jury. We hold that the judge's ruling was well within his discretion in determining the proper scope of cross-examination.

Lipton's final challenge to the judge's rulings on Williams' cross-examination is an argument—asserted on appeal for the first time in appellant's reply brief—that the judge erred in sustaining Williams' claim of privilege against self-incrimination with respect to "matters not pertaining to this indictment."

Williams claimed this privilege on cross-examination regarding the amount of the fee he received from the Shallos. Williams had testified, as indicated above, that he received a total fee of $3,500: $1,500 in checks and $2,000 in cash. He conceded, however, that he may have told agents of the IRS Inspection Division that he received only $1,500 in cash. Defense counsel then asked Williams if he reported the cash as income. In response to this question, Williams claimed his Fifth Amendment privilege. The judge sustained the claim, stating that "You have a right to raise the Fifth Amendment here as to matters not pertaining to this indictment." We agree.

We fail to see any probative value to Lipton's defense in Williams' answer to this question, had he been directed to answer. Clearly, it is

unrelated to the issue for which it is claimed by Lipton's counsel on appeal, namely, whether Williams passed on to Lipton the $13,000 given him by James Shallo.[12] At most, it may be said to relate to Williams' credibility. But, as we have held above, the issue of Williams' credibility was exhaustively covered by defense counsel. We therefore hold that there was no error in the judge's excluding Williams' answer to the question, "Did you report the cash as income?" This related to a collateral matter bearing at most on the credibility of the witness. Even if relevant, the answer would have been cumulative.[13]

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12. Lipton's counsel erroneously contends that this line of cross-examination related to the $13,000 bribe money. As we read the trial transcript, the reference is to the cash—$1,500 or $2,000—paid as part of Williams' fee of $3,500.

13. Lipton claims that Williams, by testifying as a government witness, waived his privilege against self-incrimination, specifically with respect to questions regarding his own income tax returns. Appellant's heavy reliance on Brown v. United States, 356 U.S. 148 (1958), is misplaced. Brown involved a contempt conviction of a party to the suit who, having taken the stand on her own behalf, refused to answer questions on cross-examination. The decision does not stand for the proposition for which it is cited by appellant, namely, that a witness, by giving testimony, waives his privilege against self-incrimination as to any and all questions asked on cross-examination. The Supreme Court specifically held that its decision was not that broad. 356 U.S. at 155-57. See Hatt v. United States, 363 F.2d 761, 764 (9th Cir. 1965), cert. denied, 384 U.S. 905 (1966); United States v. Coll, 343 F.2d 573, 579-80 (8 Cir.), cert. denied, 382 U.S. 821 (1965); Smith v. United States, 331 F.2d 265, 276-78 (8 Cir.), cert. denied, 379 U.S. 824 (1964); United States v. Lawrenson, 315 F.2d 612, 613 (4 Cir.), cert. denied, 373 U.S. 938 (1963); United States v. Cardillo, 316 F.2d 606, 611 (2 Cir.), cert. denied, 375 U.S. 822 (1963).

Decision

III.

Lipton next contends that the district judge erred in allowing in evidence the alleged hearsay testimony of Lawrence Ruggiero, an IRS agent, that in December 1968 and in September 1969 Williams admitted that he had paid a bribe to Lipton on the Shallo case. This claim is without merit.

Defense counsel on cross-examination of Williams asked whether he had ever told certain people prior to his arrest that he had paid off Lipton. Williams replied in the negative. Defense counsel pressed the matter further and obtained an admission from Williams that he had mentioned the pay-off to Ruggiero. The government then called Ruggiero as a witness. He testified that, while posing as a corrupt IRS agent during the investigation of Williams, the latter discussed with Ruggiero other IRS agents who had accepted bribes and who could be consulted on deals. During the course of these conversations, Williams told Ruggiero about the bribe he had paid to Lipton on the Shallo case.

At the outset, we note that Lipton did not object at trial to the admission of Ruggiero's testimony as hearsay; indeed, he conceded that it was admissible as a prior consistent statement by Williams. It is true that Lipton's trial counsel did interpose a general objection to the admission of Ruggiero's conversation with Williams, which objection was promptly overruled; but of course this was insufficient to preserve for appeal the

presently asserted hearsay claim. Moreover, Lipton did not request the instructions which he now claims should have been given; nor did he object to the judge's charge on the subject. Under these circumstances, the short answer to Lipton's claim is that he is precluded from raising it for the first time on appeal, since it was not plain error. United States v. Indiviglio, 352 F.2d 276, 279-80 (2 Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966), and many other cases to the same effect.

Even if a proper objection at trial had been made, however, we would find no error in the admission of Ruggiero's testimony. It was admitted for the limited purpose of rehabilitating Williams by showing that, at a time when he had no motive to lie, he made statements consistent with his testimony at trial. 4 Wigmore, Evidence §1128, at 203 (3d ed. 1940). The testimony was admitted, not for the truth of the matter asserted, but simply to show that prior consistent statements were made. United States v. DeLaMotte, 434 F.2d 289, 293 (2 Cir. 1970), cert. denied, 401 U.S. 921 (1971); United States v. DiLorenzo, 429 F.2d 216, 220 (2 Cir. 1970), cert. denied, 402 U.S. 950 (1971); United States v. Grunewald, 233 F.2d 556, 566 (2 Cir. 1956), rev'd on other grounds, 353 U.S. 391 (1957). Moreover, the judge's instruction to the jury,[14] made without

14. Judge Levet charged the jury on this matter as follows:
"If you find that the statements by Mr. Williams were also made at a time prior to which a suggested motive would have arisen, particularly here before the arrest, then you may consider these prior statements by Mr. Williams on the question of whether or not he really had any motive to lie in this case."

objection by defense counsel, adequately informed it of the limited purpose of such testimony. United States v. DiLorenzo, supra, 429 F.2d at 220.

IV.

Lipton further contends that his privilege of not testifying was violated by the prosecutor's comment in summation upon the failure of the defense to call witnesses to support its theory that Agent Haber had maliciously inflated the field audit.[15] This claim is without merit for several reasons.

First, we have held that the prosecutor may comment upon the defense's failure to call witnesses to contradict the government's case. United States ex rel. Leak v. Follette, 418 F.2d 1266, 1268-70 (2 Cir. 1969), cert. denied, 397 U.S. 1050 (1970). Nor does this case fall within the exceptions to that rule where, for example, the defendant alone has the information to contradict the government's case, Leak, supra, 418 F.2d at 1269-70, or where the jury will "naturally and necessarily" interpret the summation to be a comment upon the defendant's silence, Leak, supra,

15. The prosecutor's statement in summation was as follows:

> "From little bits and pieces of evidence Mr. Kantor has conjured up this story about a raw deal by Mr. Haber. Can you believe that? If Mr. Haber's report was unfair, why didn't Mr. Kantor call Mr. Haber and prove it to you? Why didn't he call Mr. Ragni [the Shallos' accountant] and say, 'I didn't like Haber. He was no good. He was unfair.' Why wasn't there some evidence of this?
>
> Because it is all speculation. How much do we know—"

418 F.2d at 1269; United States ex rel. D'Ambrosio v. Fay, 349 F.2d 957, 961 (2 Cir.), cert. denied, 382 U.S. 921 (1965). Here, the prosecutor specifically referred to the failure of the defense to call Haber or Ragni, without any reference to Lipton's failure to testify himself.

Second, the remark by the prosecutor here in question was fair rejoinder to defense counsel's argument in summation that:

> "[T]here is testimony in this record that Mr. Ragni and Mr. Haber didn't get along. I think the phrases were that Mr. Ragni wouldn't cooperate in the course of the examination. The result was a whopping deficiency assessment."

We have so held. United States v. Tortora, ___ F.2d ___, ___ (2 Cir. 1972), slip op. 4241, 4248 (July 24, 1972); United States v. Leeds, 457 F.2d 857, 860 (2 Cir. 1972); Leak, supra, 418 F.2d at 1269-70; United States v. Mattio, 388 F.2d 368, 371 (2 Cir.), cert. denied, 390 U.S. 1043 (1968); United States v. Feinberg, 140 F.2d 592, 595 (2 Cir.), cert. denied, 322 U.S. 726 (1944).

Finally, the instruction given by Judge Levet immediately after the statement in question,[16] to which defense counsel did not object, cured any prejudice to Lipton. Cf. United States v. Briggs, 457 F.2d 908, 911-12 (2 Cir. 1972).

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16. "Of course, I think it is fair to say at this time that the defendant is not required to call any witnesses, Mr. Fitzpatrick."

Decision

V.

Lipton's final contention is that the district judge erred in failing to direct the government to produce certain material required by the Jencks Act, 18 U.S.C. §3500 (1970), or Brady v. Maryland, 373 U.S. 83, 87 (1963). We reject this contention as frivolous.

At the conclusion of the direct examination of the witness Ruggiero, the government produced, in compliance with the Jencks Act, portions of a transcript of tape recordings of conversations, see page 9, supra, between Ruggiero and Williams on December 19, 1968 and September 10, 1969 relating to Lipton.[17] After Lipton's counsel cross-examined Ruggiero concerning these documents, they were offered as full exhibits by Lipton's counsel and were allowed in evidence by the judge. After reviewing these documents, moreover, and at the request of Lipton's counsel, the judge ruled that they should have been produced while Williams was on the stand. The judge therefore ordered the government to produce Williams the next day for further cross-examination by Lipton's counsel. When court resumed the next day, however, defense counsel stated that "I [have] reviewed all of the circumstances" and "I withdraw my request for the production of Mr. Williams."

17. The two documents produced were immediately marked government Exhibits 3508 and 3509 for identification and later as defendant's Exhibits D and E in evidence.

Decision

Aside from the two documents referred to above, defense counsel brought out on his cross-examination of Ruggiero that he had had about 60 recorded conversations with Williams during the 18 month undercover investigation of Williams while Ruggiero was posing as a corrupt agent; that Williams had told Ruggiero about 40 corrupt IRS personnel; and that Williams had said he never held back bribe money from an agent with whom he was dealing. Regarding the latter, defense counsel and, at his request, the judge asked Ruggiero whether that conversation had been recorded; he responded that "[i]t may have been recorded or it may have been the first time that I met him." Defense counsel then asked the prosecutor "whether there is a record of that conversation," to which the prosecutor responded, "I don't know, Your Honor." This subject was never thereafter pursued by defense counsel. At no time did he ever ask that a record of such conversation, if there was one, be produced.

Under these circumstances, we hold that there is no basis in this record for Lipton's claim on appeal that his rights under the Jencks Act or under Brady were violated. There was nothing whatsoever in the direct examination of either Williams or Ruggiero which touched upon alleged corruption of agents other than Lipton. The judge permitted a broad scope of cross-examination of Ruggiero on the basis of the §3500 material produced and on the issue of whether any other §3500 material existed. Lipton expressly withdrew his request that Williams be recalled for further cross in the light of Exhibits D and E in

evidence. With respect to the possible existence of the only other recorded conversation about which defense counsel inquired, his failure to demand its production or otherwise to pursue the matter in the trial court precludes his claiming error with respect thereto on appeal. Finally, for aught that appears before us, any record, if there were one, of a conversation in which Williams said he never held back bribe money from an agent can hardly be said to qualify as "evidence favorable to [the] accused." Brady, supra, 373 U.S. at 87.

We have considered Lipton's other claims and find them without merit.

Affirmed.

Order

72-1198

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

United States of America,
Plaintiff-Appellee,

v.

Joseph Lipton and William Williams,
Defendants,

Joseph Lipton,
Defendant-Appellant.

- -x

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue liberty pending certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition and motion be and they are denied.

HENRY J. FRIENDLY, Chief Judge

CARL McGOWAN

WILLIAM H. TIMBERS

October 23, 1972